Supreme Court, U.S.
FILED
JUL 27 2001
OFFICE OF THE CLERK

NO. 01-1933

IN THE
Supreme Court of the United States

MAJOR MAURICE ANDERSON
Petitioner
v.

DAVID RUSSELL
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jay H. Creech
14741 Governor Oden
Bowie Drive, Suite 5121
Upper Marlboro,
Maryland 20772
(301) 952-5239
Counsel of Record

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **II**

I. ARGUMENT **1**

A. THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW BY THIS COURT 1

B. THE FOURTH CIRCUIT DID NOT ERR IN ITS APPLICATION OF FACTS BASED UPON CONSIDERATION OF ALL OF THE EVIDENCE PRESENTED 2

II. CONCLUSION **6**

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct 2505 (1986) 3
Graham v. Connor, 490 U.S. 386, 109 S.Ct 1865 (1989) 2, 6, 7
Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 S.Ct. 2097 (2000). 2
Saucier v. Katz, ___ U.S. ___, 121 S.Ct 2151 (2001) 2

I. ARGUMENT

A. This Case Does Not Meet The Criteria For Review By This Court

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. The Petitioner essentially contends that this case falls within the reasons enumerated in subsection (a) which states that:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . .

The rule further notes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Anderson's sole argument is that the Fourth Circuit made erroneous application of the facts and in doing so "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant certiorari. The Fourth Circuit decision is not in conflict with either the decision of another United States court of appeals or a decision by a state court of last resort, indeed, the law on the

issue of constitutional violations is clear. However, as noted by the Court in *Saucier v. Katz*, ___ U.S. ___, ___, 121 S.Ct 2151, 2158 (2001), "*Graham*[1] does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." The Petitioner merely disagrees with the Fourth Circuit's application of the facts in this specific case to that test.

B. The Fourth Circuit did not err in its application of facts based upon consideration of all of the evidence presented

The Petitioner claims that the Fourth Circuit ignored alternative evidence and elected to believe the Respondent regarding two significant issues: the existence of a bulge near Anderson's waist (which could have been a weapon), and; whether he reached for the area of the bulge. Petition at p. 17. Neither of these facts were seriously disputed by the Petitioner during the trial and there is not more than a scintilla of evidence contradicting either.

The Court must determine whether there was legally sufficient evidence to support a verdict in favor of Anderson when considering Officer Russell's judgment as a matter of law. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150, 120 S.Ct. 2097, 2110 (2000). The inquiry is identical to that considering motions for summary judgment. *Id.* "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 106 S.Ct 2505, 2511 (1986). A reviewing court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

---

[1] *Graham v. Connor*, 490 U.S. 386, 109 S.Ct 1865 (1989).

one party must prevail as a matter of law." *Id.* at 251-2, S.Ct at 2512.

The evidence showed that on December 28, 1991, David Russell, a sworn police officer with the Prince George's County Police Department (JA 166), was working part-time at Prince George's Plaza (JA 166) with PO David Pearson. JA 216, 483. The officers were in police uniforms (JA 209-10, 282) at that time and Officer Russell received a report of an individual armed with a handgun from a patron of the plaza. JA 210-11. The patron identified Major Maurice Anderson as the individual with a handgun by pointing to him. JA 210-11. Officer Russell observed Anderson for a period of time noticing that this individual had a bulge in his left side consistent with a handgun. JA 174, 211-12.

Anderson was approached by both officers with their handguns drawn (JA 215, 498-99), ordered to drop some money in his hand (JA 183, 214-16) and raise his hands. JA 216, 501-03. He dropped the money (JA 183, 216, 283) and initially complied with the orders to raise his hands but he lowered them again and then he was ordered to get on his knees. JA 183-84, 216, 283, 501-03. He did not fully raise his hands despite three or four commands to do so. JA 216-18, 501-03. Further, despite repeated commands to keep his hands up and visible to the officers, Anderson reached inside the left portion of his jacket (in the area of the bulge) where Officer Russell could not see his hand. JA 185, 217-18, 466-69, 477. He states that he had a radio in his left back pocket and an eyeglass case with shoe polish inside his belt and covered by his jacket on his left side. JA 279-80. Anderson does admit to reaching with his left hand into his back pocket to turn off his radio. JA 255, 257, 283. Officer Russell felt certain that Anderson was trying to access the reported handgun and, fearing for his life, shot him. JA 217, 219-20.

The petition claims that the jury may have concluded that Officer Russell never observed any bulge in his waistband. This is disingenuous as Anderson admitted that he had an eyeglass case with shoe polish stuffed into it on his left belt area beneath his sweater. JA 279-80. For the jury to conclude that no such bulge existed, it would have had to reject the testimony of both of the parties and substitute a conclusion that was never presented.[2]

Anderson further suggests that the jury may have accorded little or no weight to the information given by the patron of the mall or found that the officer was unreasonable in believing this report. There is absolutely no evidence to discredit the officer's report of this conversation with the mall patron or his decision to accept the information provided and investigate. Officer Russell did not have to either believe or disbelieve this report but he did have the duty to investigate this possible serious criminal violation. There is not a scintilla of evidence to support Anderson's contention on this point and it is pure speculation that the jury totally ignored this uncontroverted information.

It is contended that the jury may have concluded that the officer never observed the Petitioner reach towards the bulge and, thus, was not entitled to use deadly force. The officer clearly testified that Anderson moved his hand to an area inside his clothes and near the bulge where the hand was not visable. JA 185, 217-18. Anderson agreed that he was reaching to turn off the radio in his back pocket at the time he was shot. JA 255, 257, 283. Officer Pearson stated that, while he didn't see any sudden movements, he wasn't watching the hands specifically but noticed that Anderson was continually moving his left hand up and down in his

---

[2] While Officer Pearson stated that he did not observe a bulge, he indicated that he didn't have an opportunity to observe this area of the suspect's body. JA 489-90.

thigh towards his waistband area. JA 503-04, 511. Brian Small, the mall security manager, also observed that the Petitioner had his hand at his waist when the officer fired. JA 468. A witness, Larry Williams, initially testified that Anderson's hands were coming down at the time he was shot but that they never got below the Petitioner's shoulders. JA 152. He also testified that he was truthful when he indicated in a prior statement that Anderson's hands were below his shoulders at that time. JA 151-52, 158-59. He admitted that he was twenty to thirty feet from Anderson and that there was some obstruction from a little structure in the door. JA 146-47.

The evidence that Anderson was reaching towards his waist area is virtually uncontested. Anderson and Officer Russell, the actor and the person closest and in a position to directly observe this act, both agree that he was reaching into his jacket on his left side when he was shot. Selecting one of Williams' versions of the events, recognizing that it conflicts with his other testimony and is further weakened by a lack of opportunity to view the entire occurrence cannot amount to more than a mere scintilla. The evidence on this issue is so one-sided that the jury could not have reasonably reached an alternative conclusion--Anderson was reaching into his jacket in the area of the bulge at the time the shots were fired.

The petition continues to assert that the conduct of the Officer Russell prior to the confrontation should be considered as to whether he was acting as a reasonable police officer. Anderson complains that the officer: failed to obtain additional information from the mall patron; approached him improperly; should have ordered him to place his hands on the wall, and; should have sought the protection of a pillar if he feared for his life. Petition at pp. 18-19. This contention is specifically the type of second-guessing that this Court has sought to avoid in Fourth Amendment analysis.

The Court in *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct 1865, 1872 (1989), provided instruction that

> [t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

The Petitioner contends that this officer made several missteps so that, at the moment Anderson's conduct gave him concern for his life or the lives of others, the jury could somehow discount Officer Russell's concern. The Fourth Circuit properly rejected this approach.

Under the circumstances facing the officers at the time of the occurrence, they had a reason to believe that Anderson was armed and the reaction to the uniformed officers' presence and commands gave Officer Russell a reasonable perception that his or the life of another person was in jeopardy. A reasonable officer under these circumstances would conclude that Anderson had a weapon and was attempting to access it. The second guessing of the approach or whether the officer could have jumped behind cover the moment he perceived a deadly threat is precisely what this Court in *Graham* cautioned against.

II. CONCLUSION

For the reasons set forth above, the Respondent

respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Jay H. Creech
14741 Governor Oden
Bowie Drive, Suite 5121
Upper Marlboro,
Maryland 20772
(301) 952-5239
Counsel of Record

July 27, 2001